No. 02-857

In the Supreme Court of the United States

HOUSEHOLD CREDIT SERVICES, INC. AND
MBNA AMERICA BANK, N.A., PETITIONERS

v.

SHARON R. PFENNIG

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE**

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QUESTION PRESENTED

Whether the Federal Reserve Board reasonably classified a fee imposed by a credit card lender because a consumer has exceeded the credit limit as one of the "other charges which may be imposed" under the account (15 U.S.C. 1637(a)(5)) rather than as a "finance charge" (15 U.S.C. 1605(a)), within the meaning of the Truth in Lending Act, 15 U.S.C. 1601 *et seq*.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. The decision below invalidating an important federal regulation is wrong, creates significant practical difficulties for the credit card industry, and will produce consumer confusion. This Court should grant the petition for a writ of certiorari.

STATEMENT

1. a. The Truth in Lending Act (TILA), 15 U.S.C. 1601 *et seq.*, establishes a comprehensive scheme that requires lenders to disclose credit terms to consumers. The disclosures for open-end credit plans, such as the credit card account in this case, vary depending on the stage in the

lending process and include various items, including the "finance charge" (15 U.S.C. 1605(a)), the "annual percentage rate" (APR) (15 U.S.C. 1606(a)), and the fee at issue here —an over-the-credit-limit (OCL) fee, which is "imposed in connection with an extension of credit in excess of the amount of credit authorized to be extended with respect to such account" (15 U.S.C. 1637(c)(1)(B)(iii)).

The "finance charge" is "the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit." 15 U.S.C. 1605(a). Although TILA gives examples of charges that must be included in the finance charge and charges that may or must be excluded, OCL fees are not mentioned in either category. 15 U.S.C. 1605. The APR for an open-end plan is "the quotient (expressed as a percentage) of the total finance charge for the period to which it relates divided by the amount upon which the finance charge for that period is based, multiplied by the number of such periods in a year." 15 U.S.C. 1606(a)(2). Thus, when a finance charge for a given period includes a fee in addition to the application of an interest rate to an outstanding amount, such as a cash advance fee, the APR for the period generally increases to reflect that fee.

Creditors must make disclosures to consumers in solicitations or applications, again before opening the account, and for each billing cycle under the plan. Direct-mail applications and solicitations must inform consumers of the APRs that may apply under the plan, 15 U.S.C. 1637(c)(1)(A), and must specify certain other fees that may be assessed under the plan, including late fees and OCL fees, 15 U.S.C. 1637(c)(1)(B). Additional disclosures before opening the account must identify the conditions under which a finance charge may be imposed, the method of determining the balance on which a finance charge will be imposed and the amount of the finance charge, and the nominal APR that will be applied to balances. 15 U.S.C. 1637(a)(1)-(4). Creditors must also identify "other charges which may be imposed as part of the plan." 15 U.S.C. 1637(a)(5). For each billing cycle, the creditor must provide a periodic statement informing the consumer of, among other things, the outstanding balance, an itemization of the extensions of credit during the billing cycle, the amount of any finance charge added to the account during the billing cycle, and the total finance charge expressed as an APR. 15 U.S.C. 1637(b).

b. TILA requires the Board of Governors of the Federal Reserve System (Board) to issue regulations to carry out its purposes. Those regulations "may contain such classifications, differentiations, or other provisions, and may provide for such adjustments and exceptions for any class of transactions, as in the judgment of the Board are necessary or proper to effectuate the purposes of [the Act], to prevent circumvention or evasion thereof, or to facilitate compliance therewith." 15 U.S.C. 1604(a). Creditors who act in good faith reliance on a rule, regulation, or interpretation by the Board or its staff are protected from liability under the civil liability provisions of TILA, even if the rule or interpretation in question is later rescinded by the Board or held invalid by a court. 15 U.S.C. 1640(f).

The Board's Regulation Z, adopted pursuant to Section 1604(a), provides that OCL fees, which it describes as "[c]harge[s] * * * for exceeding a credit limit," as well as fees for late payment, delinquency, default, and similar occurrences, are not included in the finance charge. 12 C.F.R. 226.4(c)(2). The express exclusion of OCL fees from the finance charge dates from a 1981 revision to the regulation, see 46 Fed. Reg. 20,894 (1981), but the Board and its staff had interpreted the prior regulatory language to provide for the same result. See Official Interpretive Letter FC-0142 (Fed. Reserve Bd. Jan. 9, 1978); Unofficial Staff Interpretation PI-1281 (Fed. Reserve Bd. Feb. 14, 1978).

In accordance with TILA, Regulation Z requires creditors to make disclosures with direct-mail applications or solicitations, before the initial use of a credit card plan, and with each billing cycle. 12 C.F.R. 226.5a, 226.6, 226.7. Although Regulation Z does not require those disclosures to include OCL fees in the finance charge or APR, it requires all of the disclosures to identify any OCL fee as a charge other than a finance charge. 12 C.F.R. 226.5a(b)(10) (direct mail solicitations); 12 C.F.R. 226.6(b) (initial disclosures); 12 C.F.R. 226.7(h) (periodic statement). See 12 C.F.R. Pt. 226 Supp. I, Official Staff Interpretations, Cmts. 6(b)-1(i), 7(h)-4 (requiring OCL fees to be disclosed as "other charges" on initial and periodic disclosures).

2. a. Respondent Sharon Pfennig is a consumer who holds a credit card account originally issued by an affiliate of petitioner Household Credit Services, Inc., and now held by petitioner MBNA America Bank, N.A. On behalf of a purported nationwide class of petitioners' customers, respondent sued petitioners in the United States District Court for the Southern District of Ohio. Pet. App. A31-A41. Respondent alleged that petitioners violated TILA when they allowed her to incur charges that caused her balance to exceed her credit limit, imposed an OCL fee, and failed to disclose the OCL fee as a finance charge or to include it in the APR on her periodic statement. *Id.* at A32-A33, A39-A40. Respondent did not allege that petitioners failed to disclose the OCL fee as an "other charge," as required by Regulation Z.

The district court granted petitioners' motion to dismiss the complaint. Pet. App. A24-A29. The court observed that Regulation Z specifically provides that an OCL fee is not a finance charge. *Id.* at A27. The court noted that the regulation excludes from the finance charge several fees, including late fees, delinquency charges, and OCL fees, "all of which arise when the terms under which the credit was extended have been breached by the borrower." *Id.* at A28. The court concluded that the "Board rationally determined that those charges, for acts amounting to breaches of the agreed upon credit extension, are not finance charges." *Ibid.* Accordingly, the court deferred to the Board's regulation, as required under *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980), and held that petitioner's complaint fails to state a claim upon which relief can be granted. Pet. App. A28.

b. A divided panel of the United States Court of Appeals for the Sixth Circuit reversed. Pet. App. A1-A23. The court acknowledged its obligation under this Court's decisions to give "deference * * * to the [Board]'s interpretation of [TILA] as long as such interpretations are not irrational." *Id.* at A6. Nonetheless, the court of appeals declined to defer to Regulation Z's provision that OCL fees are not part of the finance charge. *Id.* at A8-A15.

The court of appeals first stated that, "as a remedial statute, [TILA] must be given a liberal interpretation in favor of consumers." Pet. App. A8. The court then went on to conclude that the OCL fee imposed here "falls squarely within the statutory definition of a finance charge." *Id.* at A9. The court noted that TILA defines the finance charge as "the sum of '*all charges*'" paid by the borrower and assessed by the creditor "as an incident to the extension of credit." *Ibid.* The court read respondent's complaint to allege that she was charged OCL fees after she requested and was granted additional credit, because the complaint alleged that petitioners allowed her to incur the charge that caused her account to exceed the credit limit. *Ibid.* The court stated that, "under a plain reading of § 1605(a) and the general rules of statutory interpretation, the [OCL] fee was imposed incident to the extension of credit to [respondent]." *Ibid.* The court concluded that "Regulation Z's exclusion of over-limit fees, such as those imposed in this case, from the 'finance charge' conflicts with the express language of

TILA," and "the regulation cannot stand." *Id.* at A12. The court noted, however, that its holding applies only when "the creditor knowingly permits the credit card holder to exceed his or her credit limit." *Id.* at A15 n.5.[1]

Chief District Judge Edgar (sitting by designation) dissented from the court's holding that Regulation Z is invalid. Pet. App. A19-A23. Observing that OCL fees are not mentioned in TILA's definition of "finance charge," Judge Edgar reasoned that, although the panel majority's interpretation of the statutory language "might well be a reasonable one," the Board's reading is also reasonable. *Id.* at A22. In his view, the Board reasonably analogized OCL fees to other charges, such as those for late payment or delinquency, that "are clearly not a part of the finance charge because they are, as the district court concluded, post extension of credit occurrences." *Ibid.* Judge Edgar noted that, in *Milhollin*, this Court held that the Board's regulations construing TILA are "dispositive" unless "demonstrably irrational." *Ibid.* (quoting *Milhollin*, 444 U.S. at 565). He further noted that the court of appeals' decision "effectively amends Regulation Z in [the Sixth Circuit]," and thereby breaches "[t]he national uniformity established by the [Board] for consumer credit." *Id.* at A22-A23. Judge Edgar would instead have deferred to the Board's regulation as a reasonable interpretation of TILA. See *id.* at A23.

Petitioners sought rehearing and rehearing en banc, and the Board filed an amicus brief in support. Pet. App. A43-A53. The Board's brief explained that its regulation reflects the circumstances under which OCL fees are generally imposed. In particular, the Board explained that creditors

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[1] Although it invalidated Regulation Z as applied to the OCL fees in this case, the court concluded that petitioners were entitled to immunity from money damages under 15 U.S.C. 1640(f) because they had relied in good faith on the regulation. Pet. App. A15-A18.

almost never have the real-time information necessary to determine whether a particular credit transaction for which approval is being sought will actually cause a consumer to exceed a credit limit. *Id.* at A48-A50. For that reason, when a creditor authorizes a transaction that will ultimately cause the consumer to exceed the credit limit, the creditor is not generally knowingly extending credit in excess of the limit. Creditors therefore do not impose OCL fees until the conclusion of the billing cycle, and the decision to impose the fee is based on a backward look at the account history. *Id.* at A50-A51. The Board also explained that the court's decision would create serious compliance difficulties for creditors and confusion among consumers. *Id.* at A51-A52.

The court denied panel rehearing but amended its opinion to add a footnote that rejected the Board's arguments. See Pet. App. A10-A11 n.2. The court dismissed the Board's explanation of industry practice and the reasons for the regulation as facts that "were never raised below and are not in the record." *Id.* at A10 n.2. The court suggested that concerns about the invalidation of the regulation could be addressed at trial, at which time petitioners could challenge respondent's allegations that they knowingly allowed her to exceed her credit limit by permitting her to incur the charge that had that result. *Id.* at A11 n.2. The full court later denied the petition for rehearing en banc. *Id.* at A30.

DISCUSSION

This Court should grant the petition for a writ of certiorari. The court of appeals incorrectly held that TILA demands disclosure of the OCL fees imposed in this case as a finance charge. In so doing, the court erroneously invalidated an important Board regulation that sets clear and uniform national standards for nationwide creditors. The decision will result in conflicting disclosure requirements that seriously burden the credit card industry, create confusion for consumers, and undermine TILA's goal of a coherent system of uniform disclosures. The issue is important, and its resolution by this Court is warranted.

I. THE COURT OF APPEALS ERRED IN INVALIDATING THE BOARD'S REGULATION EXCLUDING OCL FEES FROM THE FINANCE CHARGE

A. The Regulation Reasonably Resolves Ambiguity In TILA

1. TILA does not directly address whether OCL fees should be disclosed as part of the finance charge or instead as other charges that may be incurred under a credit card plan. TILA defines the "finance charge" to include "all charges" imposed on the consumer by the creditor "as an incident to the extension of credit." 15 U.S.C. 1605(a). But TILA makes clear that not every charge associated with a credit agreement is "incident to the extension of credit." The Section defining "finance charge" lists "examples" of charges included in the finance charge and identifies some charges connected with the extension of credit that are not included. See 15 U.S.C. 1605. Neither the "examples" nor the express exclusions would be necessary if all charges connected with the extension of credit were included. Likewise, the Section prescribing disclosures for open-end credit plans, such as credit card accounts, requires separate disclosure of "other charges which may be imposed as part of the plan" in addition to the finance charge. 15 U.S.C. 1637(a)(5).

Equally important, in the specific circumstances where TILA addresses OCL fees and requires their disclosure, it does not classify them as finance charges. See 15 U.S.C. 1637(c)(1)(b)(iii) (direct-mail applications and solicitations for credit card accounts); 15 U.S.C. 1637(c)(4)(B)(iii) (written applications and solicitations for charge cards). Although Congress was clearly aware of OCL fees, it did not address their treatment in the definition of finance charge nor elsewhere classify OCL fees as finance charges, despite the fact that it expressly addressed the treatment of various other fees. See 15 U.S.C. 1605.

2. Because TILA itself does not address the proper classification of OCL fees, the Board, in its implementing regulations, had to decide whether to classify such fees as part of the "finance charge" (15 U.S.C. 1605(a)) or instead as one of the "other charges which may be imposed as part of the [credit] plan" (15 U.S.C. 1637(a)(5)). TILA gives the Board broad authority to make "such classifications * * * as in the judgment of the Board are necessary or proper to effectuate [TILA's] purposes." 15 U.S.C. 1604(a). Exercising that authority, the Board reasonably classified OCL fees, like other fees imposed because a consumer violates the terms of the credit agreement, as "other charges" rather than part of the "finance charge."

That determination is embodied in Regulation Z's exclusion from the finance charge of "[c]harges for actual unanticipated late payment, for exceeding a credit limit, or for delinquency, default, or a similar occurrence." 12 C.F.R. 226.4(c)(2). Those fees must instead be disclosed separately as "other charges." 12 C.F.R. Pt. 226 Supp. I, Official Staff Interpretations, Cmts. 6(b)-1(i), 7(h)-4.

The Board's determination reflects that those fees are not imposed when credit is extended in accordance with the terms of the agreement but are imposed only if the consumer violates the agreement. For the creditor, the fees serve important functions apart from compensating for increased credit risk resulting from the higher balance. They deter consumers from violating the agreement and compensate the creditor for the additional risk inherent in dealing with a consumer who does not abide by the agreement's terms. For the consumer, such fees are not integral to the cost of credit under the agreement, because the consumer will not incur them by borrowing in accordance with the agreement. The

Board reasonably concluded that consumers will find the finance charge more meaningful when comparing credit costs if it is calculated based on the assumption that consumers comply with the terms of their credit agreements. The Board also reasonably concluded that treating these penalty-type fees uniformly, rather than distinguishing among them in ways that may not be significant to consumers and to creditors, will best facilitate consumer understanding and industry compliance.

B. The Court Of Appeals Failed To Accord The Board's Regulation The Deference Required By This Court's Cases

1. Under this Court's precedents, the court of appeals should have deferred to the Board's reasonable regulation. As a general matter, when a statute is "silent or ambiguous with respect to the specific issue" covered by an authorized and validly promulgated regulation, courts must defer to the regulation if it is "based on a permissible construction" of the statute. *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). That principle has heightened force in the context of regulations issued by the Board under TILA.

As this Court has explained, TILA gives the Board unusually "broad administrative lawmaking power." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 566 (1980). Moreover, in recognition of both the Board's central role and the need for uniformity in this area, TILA provides creditors a defense from liability if they comply in good faith with a Board "rule, regulation, or interpretation" or an official interpretation by Board staff. 444 U.S. at 567 (quoting 15 U.S.C. 1640(f)). Congress thus has expressed "a decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation." *Id.* at 568. Deference to the Board is also "compelled by necessity" because the goal of "meaningful disclosure" that animates TILA requires a policy balance between "complete disclosure" and "informational overload." *Ibid.* The Board is better suited than the courts to strike the appropriate balance, because doing so "entails investigation into consumer psychology" and requires "broad experience with credit practices." *Id.* at 568-569.

For those reasons, this Court has held that, "[u]nless demonstrably irrational," constructions of TILA by the Board or its staff "should be dispositive." *Milhollin*, 444 U.S. at 565. Thus, "absent some obvious repugnance to the statute, the Board's regulation implementing [TILA] should be accepted by the courts." *Anderson Bros. Ford* v. *Valencia*, 452 U.S. 205, 219 (1981).

2. Although the court of appeals cited *Milhollin* and *Valencia*, see Pet. App. A5-A6, the court did not afford the Board's regulation the deference that those cases require. Rather, the court classified TILA as "a remedial statute" and purported to give it "a liberal interpretation in favor of consumers to protect them in credit transactions." *Id.* at A8-A9. By applying that rule of construction, the court usurped the Board's role in "strik[ing] the appropriate balance" between "complete disclosure" and "informational overload." *Milhollin*, 444 U.S. at 568. In the Board's view, the interpretation adopted by the court of appeals is not more protective of consumers and indeed will produce substantial confusion among consumers. And, in any event, it is for the Board, and not the courts, to decide how such policy considerations should influence interpretation of ambiguities in TILA.

The court rejected the Board's determination that OCL fees should be treated like other fees imposed for consumer violations of the credit agreement, such as fees for late payment, delinquency, or default. The court reasoned that those other fees are imposed when the consumer "*unexpectedly*" violates the agreement, but the OCL fees here were imposed after the creditor allegedly permitted the consumer to incur charges that caused her to exceed the credit limit. Pet. App. A14. When "the creditor knowingly permits the credit card holder to exceed his or her credit limit" and then imposes an OCL fee, the court reasoned, the OCL fee is, in that circumstance, although not in others, "incident to the extension of that credit." *Id.* at A15 n.5.

But nothing in TILA requires that the finance charge include a fee for violating the credit agreement simply because the breach of the agreement is not unexpected. The court's rule, which distinguishes OCL fees from one another based on the creditor's subjective knowledge at the time that the over-limit transaction occurs, finds no support in TILA's text. Moreover, it reflects a fundamental misunderstanding of the ordinary operation of the credit card industry and would frustrate, rather than effectuate, the purposes of TILA.

The court premised its holding that the OCL fee at issue here was "incident to the extension of credit" on respondent's allegation that the fee was imposed because petitioners knowingly allowed charges to her account that caused her to exceed the credit limit. See Pet. App. A13, A15 n.5. But no language in TILA's definition of finance charge suggests that whether a fee is a finance charge should turn on the creditor's subjective knowledge of the consumer's current account status. See 15 U.S.C. 1605(a).

Further, the court mistakenly assumed that authorization of an over-limit transaction is equivalent to a renegotiation of the credit limit and an agreement to extend additional credit. See Pet. App. A9, A12-A13, A14, A15 n.5. Contrary to that assumption, authorization of an over-limit transaction typically is not a "renegotiation" of the credit limit and does not evince the creditor's knowledge of or acquiescence in the consumer's violation of the credit agreement.

The point-of-sale authorization process permits a merchant to check whether the card is stolen, the account has been terminated, or transactions on the account have been blocked. But the authorization process is not designed to, and does not generally, indicate to either the merchant or the creditor whether a transaction will cause a consumer to exceed the credit limit. That is so for several reasons: Payments or refunds may have been received, or additional charges may have been incurred, but not yet posted. In addition, merchants frequently seek authorization for amounts that do not reflect actual charges. Some merchants seek authorization for a nominal amount to determine whether a consumer has a "live" card; others, such as hotels and car rental facilities, block large amounts of credit on check-in to ensure that payment will be authorized on check-out. Pet. App. A49-A50.

A creditor who declines to authorize a transaction because it is potentially over the credit limit based on information in the authorization database may cause needless hardship and embarrassment to cardholders and deny credit transactions to which cardholders may be entitled by contract. The same limitations that would cause these mistaken credit denials also prevent creditors from determining in real time that a transaction is over the limit for purposes of imposing an OCL fee. For that reason, creditors do not impose OCL fees at the time that they authorize a transaction that may cause the balance to exceed the limit. Instead, they determine whether to impose an OCL fee at the end of the billing cycle, when they can ascertain whether, in light of all charges and credits, the consumer has in fact exceeded the credit limit, and when they can consider other factors, such as the consumer's payment history, the amount by which the limit is exceeded, and how long the account was in over-limit status. Pet. App. A50. For those reasons, the Board has never placed any significance on what the merchant authorization process might indicate about the possibility that an OCL fee will later be imposed. Instead, the Board has rationally characterized all OCL fees as charges for violating the credit agreement rather than finance charges.

The court of appeals apparently declined to consider the ordinary operation of the credit card industry because it construed respondent's complaint to allege that the OCL fees here were imposed after petitioners approved a transaction with actual knowledge that it would cause respondent to exceed her credit limit. Pet. App. A10-A11 n.2, A15 n.5. The court suggested that petitioners could avoid liability if they establish at trial that they lacked such knowledge. *Id.* at A11 n.2. But that suggestion misses the point: Based on the ordinary operation of the credit card industry and the general characteristics of OCL fees, the Board rationally determined that such fees are not part of the finance charge, whether or not the creditor knowingly approved the transaction that caused the consumer to exceed the credit limit.[2]

The court's decision to reject the Board's reasonable determination and instead to distinguish between OCL fees on the basis of the creditor's "knowledge" is not only unsupported by TILA but would cause consumer confusion and

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[2] The court's statement (Pet. App. A10) that the Board conceded that there may be instances when an OCL fee is a finance charge is not correct. The court relied on a footnote in the Board's amicus brief that observes in passing that an OCL fee may not be bona fide in certain limited circumstances. See *id.* at A50-A51 n.8. The Board's brief refers to a situation where a charge is mislabeled as an OCL fee when it is not in fact a penalty imposed for breaching the agreement but is imposed for some other reason. The court seized on that statement as a concession that there were in fact questions for trial. *Id.* at A10. As the Board carefully pointed out in its brief, however, there is no allegation in this case that fees charged respondent were anything other than bona fide OCL fees. Indeed, the Sixth Circuit itself accepted that the fees imposed here were bona fide OCL fees within the meaning of Regulation Z in holding that petitioners are entitled to immunity from damages. *Id.* at A17.

frustrate TILA's purposes. An attempt to tune the disclosure instrument so finely would lead to "informational overload" that would confuse consumers rather than enlighten them. *Milhollin*, 444 U.S. at 568. A consumer who incurs OCL fees could receive some periodic statements in which the fee is disclosed as an "other charge" and other statements in which the fee is disclosed as a "finance charge." The consumer would likely be puzzled by different treatment of fees that from her point of view result from the same action. Pet. App. A51-A52.

Requiring creditors to distinguish in disclosing OCL fees on the basis of the creditor's "knowledge" would also substantially burden card issuers. Issuers would have to design and adopt complex systems to draw lines between OCL fees imposed following a "knowing" authorization and those imposed in the more common "unknowing" circumstances. Issuers would also bear substantial litigation risk from the inherent uncertainty about the precise location of such lines. Creditors face statutory damages for violations of TILA or Regulation Z equal to twice the finance charge for the transaction (up to the lesser of $500 thousand or 1% of the creditor's net worth in the case of class actions), and also must pay the costs of the action and attorneys' fees. 15 U.S.C. 1640(a). Incorrectly placing a "finance charge" in the "other charge" category subjects the lender to liability for misstating the amount of the finance charge. See 12 C.F.R. 226.7(f); 15 U.S.C. 1640(a). If the APR is overstated or understated by more than 1/8 of one percent, that, too, is a violation. See 12 C.F.R. 226.14(a).

The statutory and regulatory scheme places a premium on clear classification rules that give the regulated community the necessary notice to comply. The Sixth Circuit's case-specific, knowledge-based standard is inconsistent with that scheme. With the costs of misclassification so high, and little or no benefit to consumers from a classification scheme as finely calibrated as the Sixth Circuit's, the Board rationally adopted a simple rule that classifies all OCL fees as "other charges." The court of appeals erred in invalidating that rule.

II. THE COURT OF APPEALS' DECISION WARRANTS THIS COURT'S REVIEW

This Court should grant the petition for a writ of certiorari and reverse the erroneous decision of the Sixth Circuit. The decision creates conflicting disclosure rules that will burden credit card lenders, expose lenders to significant liability, confuse consumers, and impair the effective administration of Regulation Z.

1. By invalidating the Board's regulation, the Sixth Circuit has created conflicting disclosure regimes that will seriously burden credit card lenders. Because the Sixth Circuit's disclosure rule is directly contrary to the demands of Regulation Z, a lender cannot comply with one of the rules without violating the other. Yet a substantial number of credit card lenders operate nationwide or in multistate regions. See Federal Reserve, *Survey of Credit Card Plans* (last modified Jan. 31, 2003) <http://www.federalreserve.gov/pubs/shop/tablwb.pdf>. The need to comply with two contrary disclosure rules in a nationwide market would itself create significant burdens for lenders. But the actual burden is far greater than just having to comply with Regulation Z in some discrete, clearly-defined situations and the Sixth Circuit rule in others, because there is no clear way for a lender to determine in advance which rule applies in a particular situation.

The Sixth Circuit rule might apply to lenders located in the Sixth Circuit. Or it might apply to accounts in which the customer's address is in the Sixth Circuit. Or it might apply to transactions that occur in the Sixth Circuit. But in each of those cases, an argument could be made by a litigant after the fact that Regulation Z applied instead. For example, a lender in Ohio that makes the Sixth Circuit disclosures to all of its customers cannot be assured that a customer from New York will not demand Regulation Z disclosures rather than Sixth Circuit disclosures. A lender in Delaware that makes Regulation Z disclosures to a customer with a Florida address cannot be sure that the customer did not make his or her over-limit transaction in Ohio, and would not, on that basis, demand Sixth Circuit disclosures. Even when a lender and borrower are both within the Sixth Circuit, the lender cannot be sure that making the Sixth Circuit disclosures will insulate it from liability. The customer may have engaged in a transaction in another circuit, or may simply be included in a nationwide class action begun outside the Sixth Circuit claiming a violation of Regulation Z.

Moreover, lenders will face significant liability if a court ultimately determines that they have applied the wrong rule. As explained above, in addition to actual damages, lenders who violate TILA or Regulation Z are subject to statutory damages of twice the finance charge for the transaction (up to the lesser of $500 thousand or 1% of the creditor's net worth in the case of class actions), the costs of the action, and attorneys' fees. 15 U.S.C. 1640(a). Lenders could not avoid liability by following the Sixth Circuit rule in all situations and asserting TILA's "good faith" defense, because that provision provides immunity from liability based on compliance with rules and interpretations of the Board or its staff, not judicial interpretations. 15 U.S.C. 1640(f). And, if the Sixth Circuit's ruling in this case becomes final, lenders could no longer avoid liability in circumstances where that ruling is deemed to apply by claiming "good faith" reliance on Regulation Z. The dilemma that this situation presents to card issuers is in many ways more troubling than a typical circuit split, where the parties at least know which rule applies in a particular jurisdiction.[3]

Lenders confront the risks posed by the conflicting disclosure rules on OCL fees on a daily basis. There are almost 1.3 billion credit card accounts in the United States. See Thompson Financial Media, *Card Industry Directory* 16 (2003). Each time an OCL fee is imposed on one of those accounts, the fee must be disclosed on the monthly statement. And each time a credit card issuer makes one of those disclosures, the dual disclosure regime created by the Sixth Circuit exposes the lender to potential liability.

The existence of conflicting disclosure rules also frustrates TILA's goal of enabling consumers accurately to compare the cost of credit. See 15 U.S.C. 1601(a). Uniformity of disclosure rules is critical to the "meaningful disclosure" that Congress sought to achieve by enacting TILA. 15 U.S.C. 1601(a). If consumers receive different disclosures based on where lenders are located or where particular transactions take place, consumers cannot accurately compare the costs of obtaining credit from different lenders. Thus, TILA's effectiveness will be significantly impaired if this Court declines review and allows the divergent disclosure regimes created by the Sixth Circuit rule to stand.

2. Even apart from creating a conflict in applicable disclosure rules, the Sixth Circuit's rule imposes significant burdens on creditors and is likely to cause confusion among consumers. Compliance with the rule would require creditors to modify their practices and their systems to find a way to capture information that would allow them to determine

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[3] Federal banking agencies and other regulators with administrative enforcement authority over violations of TILA, see 15 U.S.C. 1607(a), will be faced with similar problems, with different regional offices required to apply different standards to review compliance by banks and other lenders operating throughout the country.

whether they "knowingly" permitted the particular extension of credit that put a cardholder over his or her credit limit. As detailed above, the point-of-sale authorization system is not currently capable of providing that information accurately, and development of a system that could make such distinctions would be costly and burdensome. Further, as explained above, consumers are likely to be confused, not informed, by a system that identifies some OCL fees as finance charges and some as other charges, when, from the consumer's perspective, the fees result from the same action.

Moreover, the Sixth Circuit's ruling impairs the orderly administration of TILA. More than 20 years ago, this Court noted Congress's "preference for resolving interpretive issues [under TILA] by uniform administrative decision, rather than piecemeal through litigation," because administrative rulemaking more readily produces the "coherent and predictable body of technical rules" demanded by that complex statute. *Milhollin*, 444 U.S. at 568 & n.12. The Court admonished lower courts to "honor that congressional choice" and "refrain from substituting their own interstitial lawmaking for that of the [Board], so long as the latter's lawmaking is not irrational." *Id.* at 568. The Sixth Circuit's decision disregards that admonition and threatens a return to an era when courts routinely issue interpretations of TILA that conflict with those of the Board. Both Congress and this Court have made clear that such judicial rulemaking is antithetical to this statutory scheme.[4]

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[4] Further proceedings in the district court on remand would not eliminate the adverse effects of the Sixth Circuit's decision. The decision imposes a new and incorrect legal test for the disclosure of OCL fees that depends on the subjective state of mind of the card issuer when authorizing a proposed charge. Additional development of the factual situations in which a creditor "knowingly" agrees to extend additional credit, or further elucidation of the legal criteria for determining a "knowing"

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2003

authorization and approval, even if permissible under the court of appeals' opinion, will not eliminate the fundamental defects of the court's holding.